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No. 79-1967

In the Supreme Court of the United States

OCTOBER TERM, 1979

IMPERIAL DISTRIBUTORS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners primarily contend that the court of appeals had jurisdiction to consider the order of the district court denying their preindictment Rule 41(e) motion.

1. On February 28, 1978, FBI Special Agent Lawrence Gilligan applied for a warrant authorizing the search of a truck regularly involved in the distribution of pornographic materials from petitioner Imperial Distributors, Inc., in Providence, Rhode Island, to various adult book stores in Boston, Massachusetts. In addition to a detailed affidavit, Agent Gilligan presented the magistrate with three magazines purchased at these book stores and traced to recent truck deliveries from Imperial Distributors. At the time of the application, the truck had just entered Massachusetts from Rhode Island. After reviewing the magazines, the magistrate issued a warrant authorizing Agent Gilligan to search the truck for obscene materials of

the same "tenor" as the magazines that had been presented to him—that is, "magazines [which] depict patently offensive representations or descriptions of ultimate sexual acts, normal or pervert, actual or simulated, and [which] depict lewd exhibition of the genitals" (Feb. 28, 1978 order). The warrant did not, however, authorize the seizure of any materials (Tr. 160-162).

FBI agents located the truck parked in front of an adult bookstore in Boston and, following a brief search, found 38 cartons of patently pornographic materials. In view of the surroundings and the nature of the search, the agents decided to bring the truck to a nearby FBI garage. Following a more thorough search, Agent Gilligan sought a second warrant regarding the seizure of nine magazines, five films, and certain business records. The magistrate came to the FBI garage, reviewed the magazines and films designated in Gilligan's affidavit, and issued a second warrant for the seizure of evidentiary copies of the materials.[1] On the same day, FBI agents obtained a warrant to search the premises of Imperial Distributors, Inc. in Providence, Rhode Island, and thereafter seized various business records.

2. Shortly after the seizure, petitioners filed a motion in the United States District Court for the District of Rhode Island seeking the return of their property. That court abstained from adjudicating petitioners' contentions in order to avoid a conflict of jurisdiction between the District of Rhode Island and the District of Massachusetts, where a federal grand jury investigation of petitioners was underway. The court of appeals summarily denied petitioners' request for a writ of mandamus (No. 78-1559 (1st Cir. Jan. 4,

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[1] For evidentiary purposes, the magistrate authorized the agents to seize three copies of each of the nine named magazines and two copies of each of the five named films.

1979)), and this Court denied a petition for a writ of certiorari. *Imperial Distributors, Inc.* v. *Pettine*, 441 U.S. 927 (1979).

Petitioners thereafter filed a motion for return of property in the District of Massachusetts, alleging that the search and seizure was unlawful. On July 12, 1979, the district court denied the motion, finding that both the first and second warrants were supported by probable cause. The court also rejected petitioners' contention that the first warrant, which authorized a search of the truck for materials of the same "tenor" as the three magazines inspected by the magistrate, was insufficiently specific. The court pointed out that the "tenor" of the three magazines was "unmistakable" and could be described as "fungible smut" (Pet. App. A-14). In addition, the court expressly approved the two-stage warrant procedure used by the magistrate. The court noted that when the government is investigating a wholesale distributor of pornography—as opposed to a retailer—it is not possible simply to buy a copy of the offensive material and bring it to a magistrate for a probable cause determination (*id.* at A-13). Accordingly, the court concluded that the minimally intrusive first search, followed by an independent magistrate's review prior to the seizure of the allegedly obscene magazines, fully satisfies the requirements of the First and Fourth Amendments (*id.* at A-13 to A-14).

Petitioners sought to appeal the order of the district court, but the court of appeals dismissed the appeal for lack of appellate jurisdiction. The court held that although petitioners captioned their motion in the district court a "Motion for Return of Property" it was in reality merely a motion to suppress evidence (Pet. App. A-6 to A-7). The court observed that only three copies of nine magazines and two copies of five films out of a total of 38 cartons of films and magazines were seized and that petitioner had not responded to the government's offer to make copies of

their business records. Nor had petitioners indicated that they needed the property that had been seized (*ibid.*). Because the denial of a motion to suppress is generally not appealable prior to trial, the court held that petitioners must wait until they have been convicted and sentenced and then challenge the seizure on appeal, or "[i]f there is no indictment and the property is not returned, [petitioners] can then move for its return" (Pet. App. A-8).

3. Petitioners contend (Pet. 8-12) that the court of appeals erroneously dismissed their appeal for lack of jurisdiction.[2] At the outset, we submit that review by the Court at this time is unwarranted. An indictment charging four of the petitioners and others with violating 18 U.S.C. 1465 and 371 has now been filed in the United States District Court for the District of Massachusetts. The district court has set September 8, 1980 as a trial date and, on petitioners' motion, has agreed to reconsider the lawfulness of the searches and seizures that are the subject of petitioners' appeal. Thus, petitioners now have a full opportunity to submit their claims to the lower courts. If petitioners' renewed motion to suppress is granted or if petitioners are acquitted at trial, their claims will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed, they will then be able to present all of their substantive contentions to this Court by seeking review of the final judgment.

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[2]Petitioners also challenge (Pet. 12-17) the bipartite search and seizure that occurred. The court below did not reach the merits of that claim and this Court would not ordinarily consider that issue in the first instance. See, *e.g.*, *Busic* v. *United States*, No. 78-6020 (May 19, 1980), slip op. 14 n.19. In any event, this case is readily distinguished from *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979), on which petitioners rely. Here, upon a showing of probable cause, the magistrate properly permitted a limited search of petitioner Guarino's truck without significantly disrupting either petitioners' wholesale

Similarly, the fact of indictment essentially moots petitioners' appealability question. Even if the court of appeals could have considered petitioners' Fourth Amendment claim prior to their indictment,[3] it now plainly lacks jurisdiction to consider what would be an interlocutory appeal in a criminal case. See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530, 533 (1971); *DiBella* v. *United States*, 369 U.S. 121 (1962); *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940). And that well settled rule against piecemeal appeals in a criminal case applies to those petitioners who were not indicted, as well as to the four that were. See, *e.g.*, *Cobbledick* v. *United States, supra*, 309 U.S. at 324-325; *Church of Scientology* v. *United States*, 591 F. 2d 533, 537 (9th Cir. 1979), cert. denied, No. 79-529 (Jan. 21, 1980); *Application of the United States*, 427 F. 2d 1140, 1141 (5th Cir. 1970); *Parrish* v. *United States*, 376 F. 2d 601, 603 (4th Cir. 1967).

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distributing business or their customers' retail business. See *United States* v. *Sherwin*, 572 F. 2d 196, 200 (9th Cir. 1977). Thereafter, the magistrate made a neutral, detached determination that several of the magazines and films were obscene, and he therefore permitted the agents to seize two or three copies of the offensive materials for evidentiary purposes. The truck was then permitted to deliver the bulk of its cargo.

[3]But see, *e.g.*, *United States* v. *Glassman*, 533 F. 2d 262, 263 (5th Cir. 1976); *Church of Scientology* v. *United States*, 591 F. 2d 533 (9th Cir. 1979), cert. denied, No. 79-529 (Jan. 21, 1980); *Smith* v. *United States*, 377 F. 2d 739, 742 (3d Cir. 1967). Petitioners do not allege that they need the property or that the government's continued retention of the property for use in the criminal proceedings somehow threatens them with irreparable harm. Compare *Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F. 2d 15, 17 (7th Cir. 1978). In any event, because petitioners have now been indicted, this case does not present a suitable occasion for the Court to consider the preindictment appealability of an order denying a Rule 41(e) motion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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